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SUMMARY RECORD OF THE 686th MEETING

Held at Headquarters, New York,
on Monday, 19 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.4)

1. Mr. MORÁN BOVIO (Spain) shared the view expressed at a previous meeting by the French delegation that, when work on the list of exclusions had been completed, the Commission would no longer need to maintain a distinction between trade receivables and financial receivables. Article 5 might then be unnecessary. The draft text would be very comprehensive, with just a few receivables excluded under article 4.

2. Mr. IKEDA (Japan) noted that the majority of members wished the draft Convention to have the broadest possible scope and that a degree of predictability and comprehensibility was essential. The style and structure of the draft text should be preserved without significant changes, as the document had already been thoroughly considered by governments.

3. Total exclusion of the list of receivables would excessively limit the scope of the draft Convention. On the other hand, specific partial exclusions could make implementation of the draft Convention very complicated. Variant B of article 5 (A/CN.9/470, para. 49) had obtained majority support in the ad hoc group on exclusions, but its weak point was the reference to "receivables other than trade receivables". That reference made a definition of trade receivables necessary, and could give rise to uncertainty in the future. The exclusion should therefore be made more specific, by inserting the list of excluded receivables in variant B of article 5, while maintaining the rest of the basic structure of the article.

4. He proposed the following wording: "Articles 11 and 12 (and section II of chapter IV) shall not apply to the assignment of receivables enumerated in this article. The matters addressed by these articles should be settled in conformity with the law applicable by virtue of the rules of private international law." The list of excluded receivables would follow. The advantage of that proposal was that the definition of the term "trade receivables" and the list of excluded receivables would not be required in article 6. In addition, it provided the benefit of a specific list. The distinction between total exclusion of certain assignments in article 4 and partial and particular exclusion of certain receivables in article 5 would thus be clear.

5. Mr. DUCAROIR (Observer for the European Banking Federation) welcomed the emerging consensus to the effect that the Commission should not retain the distinction between trade receivables and financial receivables. Also, a majority seemed to prefer not to have a list specifying which receivables were expressly included within the scope of the draft Convention. On the other hand, the positions of the ad hoc group and the Japanese delegation were very different. The ad hoc group was proposing total exclusion, which would be clearer, whereas the Japanese delegation was proposing an interesting adaptation of variant B of article 5. Instead of an ambiguous reference to "receivables other than trade receivables", that delegation was proposing a list of

receivables subject to partial exception - exception to articles 11 and 12. Reference was also made in the Japanese proposal, as in the original version of variant B, to section II of chapter IV. That seemed quite unnecessary: in the case of an exception to article 11, taking into account a non-assignability clause, the assignment was not effective, and in that case there was no reason to be concerned with section II of chapter IV. However, that was merely a drafting issue.

6. Mr. COHEN (United States of America) said that his delegation would no longer advocate including a list of receivables to be covered by the draft Convention.

7. Speaking on behalf of the ad hoc group, he said that the group continued to support total exclusion for the six items discussed the previous week. As the observer for the European Banking Federation had pointed out, there was an important difference between total exclusion and exclusion only from the provisions of the draft Convention mentioned in variant B of article 5. If the assignment of one of the excluded receivables was effective, as it might be under domestic law, rules to deal with that receivable were still needed; if the rules of the draft Convention applied, as they would in the absence of an exclusion, those rules would not work well. Many of the rules in the draft Convention, other than those in articles 11 and 12, did not work well in the context of receivables on the list of proposed exclusions. In particular, the rules about representations of the assignor, the priority rules in article 24 and those defining location would all cause difficulty in the case of excluded transactions. For that reason, his delegation would support a list of total exclusions rather than exclusions from only selected provisions.

8. The ad hoc group, consisting of representatives of the United States and Germany and the observer for EUROPAFACTORING, had considered those issues and proposed that the following new article 4 (2) should be inserted in the Convention:

"(2) This Convention does not apply to assignments of receivables:

(a) Arising from transactions on a regulated exchange;

(b) Arising under financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(c) Arising from bank deposits;

(d) Arising under inter-bank payments systems or investment securities settlement systems;

(e) Arising under a letter of credit or independent bank guarantee;

(f) Arising from the sale or loan of investment securities."

9. With that list of exclusions in article 4, variant B of article 5 would still have a role in the draft Convention, because there were some transactions

still within the scope of the instrument that were not assignments of trade receivables and would therefore need special treatment.

10. The ad hoc group also recommended including in the draft Convention the definition of the term "trade receivable" as contained in article 6 (l), amended to read:

"'Trade receivable' means a receivable:

(i) Arising under an original contract for the sale or lease of goods or the provision of services other than financial services;

(ii) Arising under an original contract for the sale, lease, or license of industrial or other intellectual property or other information;

(iii) Representing the payment obligation for a credit card transaction."

11. With the addition of the last two items to the definition of "trade receivable", his delegation would suggest the deletion from article 5, variant B, of the words "and section II of chapter IV", as articles 11 and 12 overrode anti-assignment clauses, among other things. If there was an anti-assignment clause, and articles 11 and 12 did not apply, domestic law chosen by the rules of private international law would determine whether the anti-assignment clause was effective. If such a clause was effective under domestic law, then there was no assignment, and application of the draft Convention was not required. If domestic law would not give effect to the anti-assignment clause, and the assignment was effective, then the debtor protection provisions in section II of chapter IV were extremely important. Therefore article 5 should simply state that articles 11 and 12 applied only to assignments of trade receivables. If any receivables were assigned, trade receivables or not, section II of chapter IV should apply.

12. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) asked whether, in the case of assignment of the receivables other than trade receivables referred to in article 5, there were provisions of the draft Convention other than articles 11 and 12 which would not apply.

13. Mr. COHEN (United States of America) said that, with the exception of articles 11 and 12, the draft Convention worked quite well for receivables other than trade receivables. A good example was a loan receivable; that type of receivable would not be excluded from the scope of the draft Convention, and did not fit under the definition of a trade receivable; therefore the rules of the draft Convention, other than articles 11 and 12, would apply. In the case of large syndicated loans, it was very common for the loan agreement to list the eligible assignees.

14. Regarding the reason why the transactions listed in article 4 (2) were not suited to the draft Convention, he said that the problem went beyond the rules on anti-assignment clauses; difficulties arose also with the rules governing the location of banks and priority rules, for example. For each of the six items on the proposed list of exclusions, several provisions of the draft Convention would not work well and would need adjustment; it was therefore proposed that

there should be full exclusion for those items, and exclusion from articles 11 and 12 for receivables other than trade receivables.

15. Mr. MORÁN BOVIO (Spain) said that his delegation supported the comments made by EBF about the proposal by the representative of Japan. It also believed that, once the list of exclusions was finalized, there would be no need to retain article 5, because difficulties could arise with some financial receivables, for example loan agreements. Article 5 created two separate groups of receivables - financial receivables and trade receivables - and the distinction between them was not absolutely clear.

16. In the case of receivables arising from bank deposits, he proposed that there should be a provision that they would fall within the scope of the draft Convention if the debtor consented.

17. His delegation felt that it would be better not to include the proposed new paragraphs (ii) and (iii) in the definition of a trade receivable; it was unwise to have an inclusive list of trade receivables, because future developments could not be foreseen .

18. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that, for practical reasons, the receivables that were excluded from the scope of the draft Convention should be excluded in their entirety. Otherwise, the Commission would have to spend a great deal of time trying to tailor the draft Convention to fit the receivables which were to be partially excluded, or to force those receivables into a draft Convention in which they did not belong. The Commission had already agreed that those receivables would be excluded from a significant portion of the draft Convention; if they were half in and half out, there could be complications in the future if a new convention was to be drafted that would cover them in their entirety.

19. Mr. FRANKEN (Germany) said that his delegation fully supported the ad hoc group's proposal. However, it had proposed the addition of the words "regardless of whether or not governed by netting agreements" at the end of article 4 (2) (d), and the words "including repurchase agreements" at the end of paragraph (2) (f).

20. With regard to the issue raised by the representatives of Japan and Spain concerning the distinction between trade receivables and financial receivables, he said that the proposed new article 4 (2) referred to assignments of receivables, not financial receivables. It might be helpful to delete the words "other than financial services" in article 6, paragraph 1, subparagraph (i).

21. Mr. DOYLE (Observer for Ireland) said that his delegation fully agreed that the exclusions from the scope of the draft Convention should be total exclusions, especially because it would be very difficult to tailor the draft Convention to receivables that were to be partially excluded.

22. The proposal by the representative of Spain to amend article 4 (2) (c) would introduce an element of uncertainty into what was a very clear exclusion.

23. His delegation agreed with the representatives of France and Spain that, if article 4 (2) listed all the exclusions that were desired, there would be no need for article 5, since there would no longer be any receivables other than trade receivables that would be covered by the draft Convention.

24. Mr. IKEDA (Japan) said that his delegation was not convinced by the ad hoc group's proposal and was concerned about the relationship between article 4 and article 5. His delegation would have no difficulty with the proposed deletion in article 5. However, when article 4 was finalized, article 5 could be deleted, for the sake of simplicity.

25. Mr. SALINGER (Observer for Factors Chain International) recalled that he had pointed out at the previous meeting that, unless receivables arising from assignment agreements - for example, factoring and invoice discounting receivables - were excluded from the scope of articles 11 and 12, the cost of credit in those types of financial agreements would be considerably increased.

26. His organization strongly supported the proposals of the ad hoc group, provided that factoring agreements, whether for the purpose of financing or for protecting suppliers of goods and services against bad debts, were regarded as financial services.

27. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) suggested that the objective of article 5 could be achieved by a specific list of exclusions from article 11. That would obviate the need to distinguish between financial and trade receivables.

28. Mr. COHEN (United States of America) recalled that, at the meetings of the Working Group held during the Commission's thirty-first session, delegations had tried unsuccessfully to define financial receivables, and there had therefore been an informal consensus to define trade receivables rather than the absence of trade receivables. As long as a clear distinction was drawn between trade receivables and non-trade receivables, that distinction could be used to state a clear rule, which was the sole purpose of article 5. If the Commission felt that article 5 added to the complexity of the draft Convention, it could be deleted, and a phrase could be included in articles 11 and 12 to indicate that those articles did not apply to receivables other than trade receivables.

29. Examples of receivables other than trade receivables which would not be excluded from the scope of the draft Convention were loan receivables, whereby a creditor made a loan to a borrower, and the borrower's obligation to repay was a receivable. Larger loans were likely to be part of a broad participation agreement among creditors. Such receivables would not be excluded from the scope of the draft Convention, and did not fall within the definition of a trade receivable, so that articles 11 and 12 would not apply.

30. His delegation had concerns about the proposal by the representative of Spain for an exception to the exclusion for bank deposits, because there would be two types of consent: consent to an assignment, and consent to be governed by the draft Convention. It was likely that in many cases a bank that was willing to consent to an assignment would not be willing to accept the

application of the rules of the draft Convention to that assignment, because that could create a malpractice trap.

31. The amendments proposed by the representative of Germany had not been included because of a suggestion that they were redundant. His delegation would have no objection to including them, but would prefer to retain the phrase "other than financial services" in article 6, for the sake of clarity.

32. The CHAIRMAN said that consensus seemed to be emerging that the exclusions in article 4 should be total exclusions. The Commission needed to decide whether bank deposits would be excluded only from articles 11 and 12, or from the draft Convention as a whole.

33. Mr. MORÁN BOVIO (Spain) said that, with regard to the distinction between trade receivables and financial receivables, it could be said that there was a trade receivable when a merchant assigned a receivable against persons to whom he had sold goods. However, if that receivable was assigned to a financial institution, it was not clear whether it would still be a trade receivable or would be a financial receivable. Difficulties could arise in the case of bank deposit accounts, where the bank was the debtor.

34. Mr. STOUFFLET (France) said that there were situations in which the distinction between trade receivables and financial receivables was not logical. For example, an international sale of a factory could by financed by bank credit to the buyer or the seller, in which case it would be a financial receivable and articles 11 and 12 would not apply; or could be financed by the seller, in which case it would be a trade receivable and, if assigned, covered by articles 11 and 12.

35. Mr. COHEN (United States of America) said that it was his delegation's understanding that a receivable arising under a contract for the sale of goods was a trade receivable, no matter how many times it was assigned.

36. He did not feel that there could be a special exception for banks. His example of syndicated loans was applicable to other financial institutions such as insurance companies. Limiting the rule to specific parties would not be satisfactory.

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

37. Mr. COHEN (United States of America) said that, following consultations with the representatives of Spain and Japan, the ad hoc group had produced a proposal that he trusted would ease outstanding concerns, particularly in relation to article 5. The simple but effective solution was to delete article 5 altogether and to transfer to articles 11 and 12 much of the wording from the proposed definition of a "trade receivable". Article 6 (1) would be deleted and articles 11 and 12 would each contain the following text: "This article applies only to receivables: (i) arising under an original contract for the sale or lease of goods or the provision of services other than financial services; (ii) arising under an original contract for the sale, lease or licence of industrial or other intellectual property or other information; (iii) representing the payment obligation for a credit card transaction." He

recognized the clumsiness of introducing the same text into two articles, but that approach had the advantage of bringing an important rule to the reader's attention at the appropriate point. Transferring the text had the additional benefit of giving the Commission time to refine the partial exclusions under those articles.

38. The CHAIRMAN noted that the proposal met the concern of some delegations that providing a definition of trade receivables as distinct from financial receivables might unduly complicate the text of the draft Convention.

39. Mr. SALINGER (Observer for Factors Chain International) hoped that the proposal would be accepted. He retained doubts, however, concerning articles 11 and 12 and reserved the right to explain those doubts during the debate on the articles.

40. Ms. WALSH (Observer for Canada) concurred with that view. Moreover, her delegation would be reluctant to conclude the discussion on the scope of the partial exclusions until the text to be inserted in articles 11 and 12 was finalized in all languages; it was an instance where issues of drafting shaded into issues of substance. One of the questions that remained to be answered was whether the phrase "other than financial services", in the proposed wording of article 6 (i), included credit facility services offered by non-financial institutions.

41. Ms. GAVRILESCU (Romania) supported the proposal, which provided the best response to the concerns that had been expressed.

42. Mr. DOYLE (Observer for Ireland) supported the proposal in principle, although he too wished to see a text before he could give a final endorsement. He also sought confirmation that the authors of the proposal were of the view that all the exclusions in article 4 should be considered total exclusions.

43. Mr. TELL (France) stressed the need for a working document before any decision could be reached.

44. The CHAIRMAN said that a written text would be required only when articles 11 and 12 came to be discussed. As for article 4, the drafting group would ensure that all the languages were aligned.

45 Mr. MORÁN BOVIO (Spain) endorsed that approach. During the debate on articles 11 and 12 it would be possible to clarify the scope of the non-assignability clauses, for example. He urged delegations to pool their ideas about the ultimate structure of articles 11 and 12; the suggested insertion, welcome though it was, constituted only an interim solution and the articles would need some recasting if the full effect of the insertion was to be achieved.

46. Mr. MORÁN BOVIO (Spain) expressed concern that an absolute exclusion from the draft Convention of assignments of receivables arising from bank deposits could lead to undesirable results for some financial institutions. He suggested the possibility of adding a provision allowing the debtor institution the option of considering the receivable as assignable.

47. Mr. TELL (France) reiterated his delegation's preference for a draft Convention with comprehensive scope. While valid reasons existed for the exclusion of some other categories of receivables, no argument thus far presented had appeared to justify the total exclusion of bank deposits. However, it might be possible for the Commission to consider excluding them from the operation of articles 11 and 12.

48. Mr. DOYLE (Observer for Ireland) said that, while he had previously supported the inclusion of bank deposits, a strong consensus against their inclusion had recently emerged in the Commission. In view of the difficulties to which their inclusion would give rise in connection with several areas of the draft Convention, such as the definition of "location" and the priority rules, it appeared that the draft Convention simply could not be adequately applied to bank deposits. As the United States representative had suggested, even a partial inclusion of bank deposits in the scope of the draft Convention would oblige the Commission to renew its search for ways to address those difficulties.

49. Ms. SABO (Observer for Canada) said that, although her delegation preferred bank deposits to be covered by the draft Convention, it was clear that the question of location with respect to bank deposits could not be resolved to the satisfaction of certain delegations. Absent a resolution of that problem, consensus on the draft Convention could be achieved only by excluding bank deposits entirely.

50. Mr. DUCAROIR (Observer for the European Banking Federation) said that the European banking profession favoured the total exclusion of bank deposits. If a broader consensus could be achieved on the question of location, the European banking profession could accept the exclusion of bank deposits from articles 11 and 12 only.

51. The CHAIRMAN said that the Commission had as yet been unable to formulate a satisfactory definition of location as applied to bank deposits, and that strong support continued to exist for their exclusion. Some delegations had proposed that debtors should be given the option of agreeing to the application of the draft Convention, and that the exclusion of bank deposits should be limited to articles 11 and 12. He suggested that those proposals should be noted and referred to the drafting group, along with the other exclusions thus far agreed. He then drew the attention of the Commission to the original article 4 (2) in document A/CN.9/470, which would enable States to file declarations under article 39 specifically excluding certain receivables from the scope of the draft Convention.

52. Mr. MORÁN BOVIO (Spain) recalled that the original article 4 (2) had been intended to provide a way for those countries that did not fully agree with specific aspects of the draft Convention to avoid the application of those aspects within their borders. The need for such an article had been apparent only before the achievement of a broad consensus on topics to be excluded from the overall scope of the draft Convention. His delegation was therefore of the view that article 4 (2) as proposed should be discarded, because it introduced uncertainty into the application of the draft Convention. Those countries having difficulties with specific provisions of the instrument could try to have

those difficulties resolved through debate at the appropriate time, but the Commission should not leave the door open to disharmony and misunderstanding in an area in which it was so close to achieving overall consensus.

53. The CHAIRMAN agreed that the inclusion of the text would mean that the draft Convention would have different spheres of application in different States, leading to uncertainty in its application.

54. Ms. SABO (Observer for Canada) said that her delegation strongly supported the view expressed by the representative of Spain. While hoping for the broadest possible application of the draft Convention, her delegation preferred to have any limitations on the instrument's scope agreed within the Commission rather than added piecemeal by States during the ratification process.

55. Ms. GAVRILESCU (Romania) said that her delegation saw a need to include the proposed article, which was intended to enhance the draft Convention's likelihood of ratification by the greatest number of countries by establishing a procedure for them to enter any reservations they might have regarding that instrument.

56. Ms. LADOVÁ (Observer for the Czech Republic) said that, as her country was in the process of harmonizing its legislation with that of the European Union, the law restricting the acquisition of real estate by foreigners would be eliminated. Her delegation therefore supported the inclusion of article 4 (2) as proposed.

57. Mr. DOYLE (Observer for Ireland) said that the proposed article 4 (2) should be deleted, as suggested by the representative of Spain. The emerging consensus on the matter of the draft Convention's scope eliminated the need for the proposed paragraph, while its continued inclusion presented the positive danger of allowing uncertainty in the draft Convention. Its deletion, on the other hand, would probably entail the need to delete article 39 as well.

58. Mr. TELL (France) said that the draft Convention's scope of application was being eroded by the increasing number of exclusions. It would be better to avoid the inclusion of articles such as 4 (2) and 39, whose effect would be seriously to impair the uniformity, and thus the effectiveness, of the draft Convention.

The meeting rose at 1 p.m.